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No. 1012

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

THE FIRST NATIONAL BANK OF WAUKEGAN as Trustee under Trust No. 616 et al., JOSEPH J. DROBNICK and MARK J. DROBNICK,

Petitioners,

vs.

THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS ETC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT AND TO THE SUPREME COURT OF ILLINOIS.

JOSEPH J. DROBNICK, *pro se.*
MARK J. DROBNICK, *pro se.*
415 Madison Street
Waukegan, Illinois

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Petitioners, Joseph J. Drobnick and Mark J. Drobnick, respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, Second District and the Order of the Supreme Court of Illinois denying the petitioners petition for leave to appeal.

OPINIONS BELOW.

The opinion of the Illinois Appellate Court second District is reported in full in 61 Ill. App. 2nd 78 and is

appended to Appendix "A" in full in this petition. A timely petition was filed with the Illinois Supreme Court requesting leave to appeal but such petition was denied without opinion, see Appendix "B".

JURISDICTION.

The judgment of the Illinois Appellate Court Second District was entered on the 9th day of July 1965 and the Petition for Rehearing which was filed in due time, was denied on July 31st, 1965. A timely petition for leave to appeal was filed with the Illinois Supreme Court and was denied on November 17th, 1965. The jurisdiction of this Court is further invoked under 28 U. S. C. ¶1257 (3). The jurisdiction of this Court is further invoked under 28 U. S. C. A. 1358. Further the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs (28 U. S. C. A. 1331). As the valuation witnesses for the landowner testified the value of the land taken and damages was in the sum of $14,500.00 (Abst 56, 57, 58).

QUESTION PRESENTED.

Can a State take private property from an individual citizen by the Court giving legal instructions to the jury which are so prejudicial that the legal effect was to take the case from the jury and order a directed verdict for the State and yet comply with the due process clause of the 14th Amendment to the United States Constitution?

Constitutional Provisions.

The only constitutional provisions, treaties, statutes, ordinances or regulations involved is the Fourteenth Amendment to the Federal Constitution.

Statement of the Case.

Part of the funds and money used to pay this condemnation judgment in this case comes from the Federal government as Belvidere Road is a Federal Aid Road No. 21 and Federal Aid Project No. 21 (Abst 2-18).

The Department of Public Works and Buildings of the State of Illinois filed a petition to condemn land on the 6th day of September, 1957 designated herein as Tracts 34 and 34A. The State also filed a Quick Take Motion and deposited the sum of $4375.00 with the Clerk of the Court for the quick taking of the fee (Abst 41, 42). On February 28th, 1964 at the trial of the cause the jury rendered a verdict of $1700.00 for land taken (Abst 39-43).

During the course of the trial, the State tendered and Trial Court gave legal instruction P-4 to the jury which reads as follows:

> "In arriving at this verdict it is not proper for you to simply average or *compromise* the testimony of witnesses on the question of land values and damages to remainder, if any. However this does not preclude you from bringing in any verdict that is within the range of the testimony in this case".

REASONS FOR GRANTING WRIT.

The 14th Amendment to the United States Constitution provides that no State shall take life, liberty or property without due process of law. Yet the State Court over specific objections gave the State's legal instruction P-4 which is so prejudicial that in legal effect the case was taken from the jury and a directed verdict was ordered for the State.

Instruction P-4 reads:

> In arriving at this verdict, it is not proper for you to simply average or compromise the testimony of witnesses on the question of land values and damages to remainder, if any. However this does not preclude you from bringing in any verdict that is within the range of the testimony of this case (Abst 80).

This instruction argues to the jury that they are to go to either the high or low figure but no figure that is in between or in the middle range. Juries never bring in a high verdict in a condemnation case. So actually the instruction argues to the jury to bring a directed verdict for the State. The giving of this instruction further caused unfair trial so that the verdicts rendered and the judgments entered thereon do not award to the Petitioners the just compensation which the law requires.

Conclusion.

For the foregoing reason it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH J. DROBNICK, *pro se.*
MARK DROBNICK, *pro se.*
415 Madison Street
Waukegan, Illinois.

APPENDIX "A".

OPINION OF THE APPELLATE COURT.

ABRAHAMSON, *P. J.*

The Department of Public Works and Buildings filed a petition on September 6, 1957 in the Circuit Court of Lake County to condemn five adjoining lots, and part of a sixth, owned by appellants. The Department filed a motion for an immediate vesting of title pursuant to the Eminent Domain Act and three appraisers were appointed by the Court to make a preliminary estimate of just compensation. On September 12, 1958 the Department's motion was granted and a preliminary finding that $3,500.00 constituted just compensation was entered by the Court. The Department deposited that amount and took possession of the property.

On February 25, 1964 the cause went to trial before a jury, which returned a verdict awarding appellants $1700 in full compensation for the condemned lots, and a further finding that adjoining land owned by appellants was not damaged by the taking.

The jury, and the trial judge, inspected the property. Judgment was entered on the verdict and post-trial motions to set aside the verdict and vacate the judgment were denied. This appeal results.

The lots taken comprised a total of 132.39 feet fronting on Belvidere Road, with an overall depth of 125 feet. The property is adjoined immediately on the East by the Chicago, Milwaukee and St. Paul Pacific Railroad, and is located about 1 mile west of the City of Waukegan. The property was bordered on the west by Melody Road, which

provided access into Belvidere Road not only for the lots taken in the condemnation but for the additional property owned by appellants immediately to the south. All the property owned by appellants was, at the time of the vesting of title, and remained, vacant. After the "quick-take" the Department raised the grade of the condemned lots approximately 25 feet above its prior level and constructed a bridge over the adjoining railroad as part of its program to make Belvidere a "Freeway." Access to Belvidere from Melody Road was eliminated but a frontage road about one-half mile west of appellants remaining lots leads into Belvidere.

The Department and the appellants both introduced the testimony of expert witnesses as to the value of the land at the time the original petition was filed. The two witnesses for the Department stated that the property was worth $2000 and $1700 respectively. One of appellants' witnesses testified that the value of the part taken was $9000, with the remainder being damaged by $5500. The owner himself stated that the lots condemned were worth $16,000, with $9000 damage to the remainder. In rebuttal, the Department introduced one of the court-appointed appraisers from the earlier hearing who testified that the part taken was worth $1520 and that the remainder was not damaged at all.

On appeal, the owners first urge that the trial court erred in permitting the Department, by leading questions, to bring to the attention of the jury that its rebuttal witness, one William D. Whyte, had been appointed by the Court to appraise the property at the earlier hearing. The Eminent Domain Act, in providing for the immediate vesting of title in certain instances (Ill. Rev. Stat. 1963, Chap. 47), provides in Section 2.2, paragraph (d) as follows:

> "Such preliminary finding of just compensation, and any deposit made or security provided pursuant thereto, shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid, and shall not be disclosed in any manner to a jury impaneled in such proceedings; and if appraisers have been appointed as herein authorized, their report shall not be evidence in such further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings."

There is no question that the Department had the right, under the statutory provision given above, to call a court-appointed appraiser from the "quick-take" hearing to testify at the final trial. While there are no Illinois cases on the point of disclosing the relation of the witness to the earlier hearing to the jury, we feel it would be good practice if that relation was not disclosed. However, in this case objection was made by appellant not to that disclosure alone, but to the appearance of Whyte at all. That objection was properly overruled and the trial court then informed the jury to disregard any reference to the fact that the witness was appointed by the court to appraise the property. We feel this prompt admonition to the jury corrected any possible error in the proceedings on that point.

Appellants further urge that in view of the fact that the Department was permitted to call Whyte to testify on their behalf, that it was error to refuse to permit another of those appraisors, Jack Williams, to testify for them. However, the record discloses that the proofs had been closed and counsel and court were conferring on instructions when appellant moved to reopen the proofs to introduce the testimony of Williams. It also appears that Williams was available to testify during the trial but

that appellant had not offered him until the proofs were closed and they had rested their case. If he had been permitted to testify, the record indicates that he would have stated that, in his opinion, the property condemned was worth $6500.

It is generally held that once a case has been closed, neither party can, as a matter of right, reopen the proceedings to introduce further testimony. *McEniry* v. *Tri-City Railway Co.*, 179 Ill. App 152. The matter is considered to be within the discretion of the trial court and will not be upset by a reviewing court unless it appears that the discretion is clearly abused and the failure to reopen the proofs resulted in substantial injustice. *Rosehill Cemetery Co.* v. *City of Chicago,* 352 Ill. 11. *Morse* v. *Fuller,* 164 Ill. App. 85. We do not feel that the trial court abused its discretion in this case. Williams was available to testify during the trial and there appears to be no explanation why he was not introduced then. Further, his testimony, if given, could not materially have effected the outcome of the trial. Other witnesses for appellant had already testified that the property was worth far more than the appraisal of Williams, and we do not feel that the absence of his testimony prejudiced appellants.

Appellants next complain that the conduct of counsel for the Department was improper and inflammatory and prejudiced them in the eyes of the jury. The only item in the record of any substance that is pointed out by appellants to support this contention is an objection by the Department during appellants' final argument that it was "hysterical". No objection to this characterization of his style was made by appellant, and the Department's objection was overruled with the court commenting that it was within proper realm of argument. Since no objection was made by appellants at the time of trial, we will not consider it on review. *County of Cook* v. *Colonial Oil*

Corp., 15 Ill. (2d) 67, 75; *Forest Preserve District* v. *Kercher*, 394 Ill. 11, 25.

Finally, appellants claim that the jury was improperly instructed as to the law and their verdict resulted from the misconceptions created thereby. We have examined all the instructions tendered and given and feel that, in general, the jury was properly instructed as to the applicable law. The record shows that appellants tendered a total of 30 instructions and that all but five were refused. Appellants raise only two of these refused instructions on appeal, both dealing with the loss of access to Belvidere Road to the remainder of their lots. However, the evidence shows that the remaining property did not have direct access to Belvidere Road before the taking and the instructions, while proper statements of the law, were inapplicable to the factual situation and might have misled the jury.

It is well settled law in this state that in condemnation cases the verdict of the jury, when it has inspected the premises, will not be disturbed on review when that verdict is within the range of the evidence and does not appear to result from passion, prejudice or palpable mistake. *Department of Public Works and Buildings* v. *Christensen*, 25 Ill. (2d) 273, 276; *School Trustees* v. *LaSalle National Bank*, 21 Ill. (2d) 552, 556. Here the jury has viewed the property and its verdict is within the range of the evidence.

We also feel that appellants were granted a fair trial and that it would be incorrect to say that the verdict of the jury was a result of passion, prejudice, or palpable mistake. We therefore affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

DAVIS, *J.* and MORAN, *J.* concur.

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Form 4

United States of America

State of Illinois
Supreme Court } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* November *in the year of our Lord, one thousand nine hundred and* sixty-five *, within and for the State of Illinois.*

PRESENT: RAY I. KLINGBIEL, CHIEF JUSTICE

JUSTICE [redacted] JUSTICE WALTER V. SCHAEFER

JUSTICE HARRY B. HERSHEY JUSTICE BYRON O. HOUSE

JUSTICE ROY J. SOLFISBURG, JR. JUSTICE ROBERT C. UNDERWOOD

WILLIAM G. CLARK, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

Be It Remembered, *that, to-wit: on the* 17th *day of* November *19* 65 *, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

The Department of Public Works and Buildings of the State of Illinois, etc.,

Respondent

No. 39507 vs.

The First National Bank of Waukegan, as Trustee, under Trust No. 616, et al.,

Petitioners

Petition for Leave to Appeal from Appellate Court
Second District
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And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

[redacted]

I, MRS. EARLE BENJAMIN SEARCY, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this* 23rd *day of* November *, 19* 65.

(SEAL)

/s/ Mrs. Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois.